

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ROBERT ADCOCK, SR., RONALD
AHO, CHARLES AMOS, JR., JOYCE
ANDRZEJEWSKI, DANIEL P. AUMAN,
DOUGLAS F. BEJCEK, TODD BERO,
WAYNE J. BERSANO, LOUISE M.
BLANCHARD, JERRY BOLLENBACHER,
GREG BOONE, FREDERICK A. BOURNE,
DOUGLAS A. BOWERS, LEE A.
BOWERSOCK, ROB BRITTSAN, MARK
BRADSHAW, FREDERICK H. BRUG,
GREGORY G. BUKOWSKI, GEORGE
BURRELL, ROBERT F. BURNETT, BRETT
M. BURRIS, ARTHUR CARMONA, JEROME
J. CASALT, ANTHONY CHILDS, JOHN
CIMBALIK, SAMUEL ROY CLEMONS,
DENNIE CONFER, TODD M. CONFER, DAVID
K. CONNER, DALE J. COUSINEAU, OSCAR
V. DAVILA, CASSAUNDR A. DAVIS,
MARGARET DAVIS, RUSSEL DAVIS, JAMES
DAWKINS, RICHARD J. DIEBEL, DAVID
DONAKOWSKI, GEORGE DRAIN, BLAKE B.
EYNON, MARLENE FABER, EDWARD N.
FAUGHT, DONALD FEUSSE, KENNETH M.
FEUSSE, STEPHEN JOHN FITZGIBBONS,
EUSIBIO JOE FLORES, KATHY I. FLORES,
SHIRLEY A. GATZA, DONALD R. GAULT,
RICHARD L. GENSEL, ROBERT L. GILLETTE,
JOHN GOULETTE, RICHARD V. HANTTULA,
GLENN A. HART, DAVID M. HARTNAGLE,
MARK L. HEATH, PATRICIA L. HOIST, EDWARD
HOLDER, MICHAEL D. HOPPE, DONALD E.
HORNEBER, JOHN A. JACOBS, RICHARD
JACOBS, RUSSELL JACOBS, THOMAS L.
JANSEN, DANIEL L. JASTER, FREDERICK J.
JIMINEZ, DANIEL G. JOHNSON, JAMES P.
JOHNSON, KEITH A. JOHNSON, DON KAIN JR.,
KENNETH HENRY KELLEY, ELIZABETH A.
KILBORN, RICK C. KING, DANNY RYAN
KINTNER, RAYMOND F. KIPFMILLER, JEFFREY
A. KLENDER, THEODORE L. KOCHANNY, JR.,
MATHEW KOMPEAS, KIP E. KUSSRO, GREGORY
JOHN LAMBERT, DOUGLAS J. LEE, STEVEN

Case No: 98-CV-10427-BC
Honorable David M. Lawson

**(OPINION AND ORDER
GRANTING DEFENDANT'S
MOTION FOR JUDGMENT
ON THE ADMINISTRATIVE
RECORD)**

R. LILLO, CHRISTOPHER C. LISEE, BERNARD E. LORANGER, LINDA LUNNI-ROBERSON, KATHRYN L. MACLEOD, TERRANCE E. MAGRYTA, DONN MAMMEL, JACKIE L. MARTENS, WALTER R. MATEUSIAK, ROGER V. MCINTOSH, MICHAEL K. MCLAREN, ROGER M. MEYLAN, DONALD F. MIDDLETON, STEVEN M. MIKOLAJCZAK, DEAN L. MILLER, THOMAS R. MILLER, SUE MONEY, GERALYNN MULDER, PATRICIA L. MUSSER, ROBERT J. MYERS, JERRY MYLES, JOSEPH NEWSOME, JACK H. NEUMAN, JR., FRANCIS W. NOHEL, ROGER A. NOVAK, JOSEPH S. OLIVAREZ, WENDY PAGNIER, STANLEY WADE PARSONS, MARK A. PFEIFFER, SHIRLEY POLASKI, THEODORE POLASKI, GERALD M. PUTNAM, PAUL BROOKS PYTLIK, DOUGLAS REAMES, VIRGIL C. REINHARDT, RANDY REZMER, WAYNE PATRICK RICHARDS, DANIEL H. ROTH, REX ALLEN SABIAS, HIJINIC SAN MIGUEL, JR., WAYNE C. SAPYAK, PAUL SCHMIDT, CHERYL A. SCHULTZ, DAVID SCHULTZ, GARY SCHULTZ, DANIEL J. SHEEHAN, SCOTT J. SHERMAN, TOM SIMON, JOSEPH C. SNYDER, THOMAS D. SPORMAN, MATT STRASSER, GAIL A. STRAUSS, KENT A. STRIKER, EUGENE F. THOMPSON, ALLEN R. TOVEY, HERBERT F. ULMAN, JEFFREY LEE VAN EVERY, JAMES E. VAN PATTEN, TIMOTHY M. VOLZ, RUSSELL F. WACHOWSKI, MARGARET WACKERLE, STEVEN L. WALTER, PATRICIA WATKINS, GLENN E. WILKINSON, SCOTT WILKINSON, DALE A. WOODS, THERESA YOUNG, CHRISTINE ANN-JEAN ZINGG, aka A. J. ZINGG, and ROBERT C. ZINGG, II,

Plaintiffs,

v.

DOWBRANDS, INC.,

Defendant,

**(OPINION AND ORDER
GRANTING DEFENDANT’S
MOTION FOR JUDGMENT
ON THE ADMINISTRATIVE
RECORD)**

**OPINION AND ORDER GRANTING DEFENDANT’S
MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD**

Plaintiffs, former employees of DowBrands, Inc. (“DowBrands”), have filed a complaint in this Court contending that they were wrongfully denied benefits under DowBrands’ Career Transition Assistance Plan (“CTAP”), an employee welfare plan as defined by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* (“ERISA”).¹ The Plan Administrator had previously denied the claim for benefits. After compiling a lengthy administrative record, the Claims Fiduciary likewise determined that the plaintiffs were not entitled to receive CTAP benefits. The defendant filed a motion seeking relief by way of judgment on the administrative record. The plaintiffs filed a response to defendant’s motion in which plaintiffs requested the Court to enter judgment directing the defendant to pay CTAP benefits in accordance with the terms of the plan. Because the Court finds that the decision of the Plan Administrator, as confirmed by the Claims Fiduciary, was not arbitrary or capricious, the Court will grant the defendant’s motion for judgment on the administrative record.

I.

On January 1, 1997, DowBrands adopted a plan to provide separation benefits to certain salaried employees who lost their jobs. The stated purpose of this plan, entitled “Career Transition Assistance Plan,” was “to provide specified post-employment benefits to certain salaried employees

¹Two judges of this Court have previously been assigned to this case. Judge Robert Cleland had previously determined that the CTAP was *not* an employee welfare plan governed by ERISA. Order Granting In Part and Holding In Abeyance In Part Plaintiffs’ Motion to Remand (April 16, 1999). The matter was reassigned to Judge Victoria Roberts on July 6, 1999; however, Judge Cleland retained jurisdiction over, and granted reconsideration on, the question of whether CTAP was governed by ERISA. On March 27, 2000 Judge Cleland ruled that the CTAP did constitute an ERISA-qualified plan, and thereby denied plaintiffs’ motion to remand the matter to state court. Order Granting Defendant’s Motion to Reconsider and Denying Plaintiffs’ Motion to Remand (March 27, 2000).

of DowBrands (the “Company”) whose employment is terminated by the Company”²

In January 1998, S.C. Johnson Wax, Inc. (“SCJ”) purchased the home care and food management divisions of DowBrands. The sale included two plants located in Bay City, Michigan and Fresno, California. The plaintiffs in this case are 148 salaried employees who were employed by those divisions at the respective locations. Upon consummation of the sale, all 148 plaintiffs lost their jobs at DowBrands, but they immediately became employees of SCJ and were formally offered permanent employment in the same job positions and at the same plant locations.

Following the sale by DowBrands, the plaintiffs filed administrative claims with that company asserting that they were entitled to DowBrands’ CTAP benefits. The plaintiffs claimed that their overall compensation level decreased when they commenced employment with SCJ and therefore, plaintiffs were entitled to CTAP benefits.

In May 1998, CTAP plan administrator, William Wales, concluded that plaintiffs were not

²The test of the CTAP states:

“The Career Transition Assistance Plan (“CTAP”) is designed to provide specified post-employment benefits to certain salaried employees of Dow Brands (the “Company”) whose employment is terminated by the Company in order to reduce or consolidate workforce levels or improve the efficiency of the workforce. The CTAP supersedes or replaces any separation plan, Involuntary Termination Plan (“ITP”), or practice currently in effect for salaried employee terminations in the Company’s businesses in the United States resulting from job elimination or redundancy declarations or workforce efficiency enhancement efforts by the Company except for any separation plan or practice applicable to employees of a Company work unit who are offered employment by an entity (whether an individual, partnership, corporation, joint venture or other business entity) which purchases or acquires the work unit or part of the work unit, whether by sale or transfer of stock or by sale or transfer of assets. The document contains a description of the benefits provided by CTAP. Please read it carefully and keep it handy for ready reference.

Career Transition Assistance Plan at 1, Administrative Record (AR) at 20.

entitled to CTAP benefits.³ Although Wales acknowledged that CTAP benefits in the form of severance pay, outplacement counseling services and reimbursement for financial counseling costs were provided to salaried employees who lost their jobs, he concluded that the plaintiffs were not eligible for CTAP benefits based on his interpretation of the language of the CTAP. His decision was based on the following Plan language:

You are ineligible to receive benefits under CTAP if the Plan Administrator determines that prior to the scheduled effective date of termination of your employment by the Company:

...

- (7) you are offered employment (even if you do not accept the offer) by an entity (whether an individual, partnership, corporation, or other business entity) which purchases or acquires the work unit or part of the work unit in which you work, whether by sale or transfer of stock or by sale or transfer of assets (and it does not involve a relocation or reduction in job status). . . .

AR at 22-23. *See also id.* at 214. Wales determined that the sale of DowBrands' home care and home food management divisions constituted a "sale of assets" of the plaintiffs' "work units" within DowBrands, that the plaintiffs were offered to continue employment at the same plants and in the same job positions under SCJ ownership as under DowBrands ownership, and concluded that therefore the plaintiffs were not eligible to receive CTAP benefits. *Id.* at 214.

In July 1998 the plaintiffs requested an administrative review of the plan administrator's determination as permitted by the CTAP. The plaintiffs claimed that they were not excepted from participation in the plan because they suffered a "reduced job status" as a result of alleged reductions in their total compensation package which included salary, bonus, benefits and employee services.

³The decision rendered by William Wales was in the form of a letter to the plaintiffs' counsel. AR at 214-17. Wales was responding to a letter from the plaintiffs' counsel in which plaintiffs asserted their claims for CTAP benefits. AR at 213(a)-(c).

The plaintiffs also accused Wales of having an “insurmountable conflict of interest” in that Wales, in addition to acting as plan administrator, also served as Vice President of Human Resources and Public Affairs, and as General Counsel for DowBrands.⁴ The plaintiffs contended that Wales could not serve both as a benefit claims fiduciary to the employees and as legal counsel to DowBrands, and therefore asked DowBrands to appoint a separate claims fiduciary to represent the plaintiffs’ interests for purposes of reviewing the determination of the plan administrator. AR at 217(a).⁵

In August 1998, DowBrands responded to the plaintiffs’ request for review of the plan administrator’s decision by appointing Robert Eldridge as Claims Fiduciary to conduct the review. Eldridge had been employed by The Dow Chemical Company from 1968 to 1995, and he had held such positions as Vice President of Human Resources at DowBrands and Director of U.S. Pension Development at Dow Chemical. Since 1995, Eldridge was a self-employed human resources consultant and performed projects for Dow Chemical.

With the assistance of independent ERISA counsel, Eldridge compiled a 1260-page administrative record, reviewed all documents therein, conducted interviews of DowBrands employees in order to ascertain the function of the CTAP benefit program, and reviewed an analysis submitted by plaintiffs’ counsel which included a comparative analysis of SCJ and DowBrands’ benefit structures by an accountant retained by the plaintiffs. Thereafter, Eldridge affirmed the findings of the plan administrator in a 17-page opinion in which he provided the rationale behind his

⁴The CTAP names the Vice President of Human Resources as the CTAP Plan Administrator. AR at 26.

⁵It is stated in the CTAP, “The Plan Administrator has the authority to delegate responsibility to other persons or committees in the Company, including a Claims Fiduciary who is to afford a full and fair review of any denial of a claim upon receipt of a timely request for review.” AR at 26.

decision to deny the plaintiffs' claims for benefits. AR at 1243-59.

Following this final determination, plaintiffs filed suit on November 30, 1998 in Bay County Circuit Court. The defendant removed the case to this Court, and after a challenge to jurisdiction brought by the plaintiffs in a motion to remand, Judge Cleland ruled on reconsideration that the CTAP required "an on-going administrative scheme sufficient to meet ERISA standards" Order Granting Defendant's Motion to Reconsider and Denying Plaintiffs' Motion to Remand at 2, and concluded that the CTAP constituted an ERISA-governed benefits plan, and thus federal question jurisdiction was established under 29 U.S.C. § 1001, *et seq.*

The matter is now before the Court for a determination of the propriety of the decision of the Plan Administrator, which was affirmed by the Claims Fiduciary. The defendant filed a motion for judgment on the administrative record, the plaintiffs filed a response and the defendant filed its reply. The Court finds that the parties have adequately set forth the relevant law and facts in their briefs and motion papers, and oral argument would not aid in the disposition of the instant motion. *See* E.D. Mich. LR 7.1(e)(2). Accordingly, the Court **ORDERS** that the motion be decided on the briefs submitted.

II.

Plaintiffs challenge the denial of benefits pursuant to section 502(a)(1)(B) of ERISA, which authorizes an individual to bring an action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). "[T]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In such an action, the Court should consider only that evidence

presented to the plan administrator at the time he or she determined the employee's eligibility. *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1993). The Court's review is limited to the administrative record. *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 615 (6th Cir. 1998). However, the Court "may consider evidence outside of the administrative record [] if that evidence is offered in support of a procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part." *Wilkins*, 150 F.3d at 619.

In this case, although the plaintiffs do not allege actual bias *per se* on the part of the plan administrator, they do contend that a structural conflict of interest exists involving DowBrands, the plan administrator and plan beneficiaries. However, plaintiffs have not sought to offer additional evidence of bias, and the Court finds that the administrative record on this point is sufficiently developed to allow adjudication of the issue. Further, plaintiffs contend that the effect of a finding of a conflict is the application of a more rigorous standard of review. The Court in this case determines that its review is appropriately confined to the administrative record.

"[A] plan administrator's decision is reviewed 'under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.'" *Shelby County Health Care Corp. v. Southern Council of Industrial Workers Health and Welfare Trust Fund*, 203 F.3d 926, 933 (6th Cir. 2000)(quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 115 (1989)). "If the benefit plan does grant such discretionary authority, the plan administrator's decision to deny benefits is reviewed under the 'arbitrary and capricious' standard of review." *Shelby County Health Care Corp.*, 203 F.3d at 933, *see also Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 555 (6th Cir. 1998)(en banc).

"The arbitrary or capricious standard [of review] is the least demanding form of judicial

review of administrative action. When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious.” *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 693 (6th Cir. 1989)(internal quotes and citation omitted). A decision reviewed according to this standard must be upheld if it is supported by “substantial evidence.” *Baker v. United Mine Workers of Am. Health and Retirement Funds*, 929 F.2d 1140, 1144 (6th Cir. 1991). Substantial evidence supports an administrator’s decision if the evidence is “rational in light of the plan’s provisions.” *See Smith v. Ameritech*, 129 F.3d 863 (6th Cir. 1993).

However, “[t]his highly deferential standard of review is appropriate only if the benefit plan contains ‘a *clear* grant of discretion [to the administrator] to determine benefits or interpret the plan.’” *Shelby County Health Care Corp.*, 203 F.3d at 933(emphasis in original)(quoting *Perez*, 150 F.3d at 555). *See also Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368, 1373 (6th Cir.), *cert. denied*, 513 U.S. 1058 (1994)). In this case, there is no credible dispute that the CTAP grants broad discretion to the plan administrator to determine eligibility for benefits. The plan language provides the plan administrator “full and complete discretion to administer and interpret CTAP and make the final decision on such issues as eligibility and payment of benefits.” AR at 26.⁶

⁶Under the heading of “PLAN SPONSOR AND ADMINISTRATOR,” the following language appears in the CTAP:

The Plan Sponsor is DowBrands, 9550 Zionsville Road, Indianapolis, Indiana 46268. The Vice President for Human Resources is the Plan Administrator and is the named fiduciary, and shall have the full and complete discretion to administer and interpret CTAP and make the final decision on such issues as eligibility and payment of benefits. Determinations of the Plan Administrator shall be final and conclusive. The Plan Administrator has the authority to delegate responsibility to other persons or committees in the Company, including a Claims Fiduciary who is to afford a full and fair review of any denial of a claim upon receipt of a timely request for review.

Plaintiffs assert that Wales acted as Vice President and General Counsel of Dow Brands, the plan sponsor and sole funding source for payment of claims against the plan, while also serving in a fiduciary capacity as the CTAP Plan Administrator. Plaintiffs contend that such duties are in conflict and violate the mandates of ERISA. Accordingly, plaintiffs argue, an “abuse of discretion” standard of review must be used to evaluate the Plan Administrator’s decision, not the arbitrary and capricious standard.

Contrary to plaintiffs’ assertion, the existence of a conflict of interest “shapes” the application of, but does not change, the arbitrary and capricious standard of review. Further, the degree of deference afforded the decision maker under either standard is considerable, and many of the decisions use the terms interchangeably. For example, the Court of Appeals for the Sixth Circuit has noted that:

Because an insurance company pays out to beneficiaries from its own assets rather than from the assets of a trust, its fiduciary role lies in perpetual conflict with its profit-making role as a business, and the conflict of interest is substantial. The court in *Brown* held that the abuse of discretion or arbitrary and capricious standard still applies, but application of the standard should be shaped by the circumstances of the inherent conflict of interest.

Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 984 (6th Cir.1991) (citing *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1561-63 (11th Cir.1990)) (internal citations omitted). See also *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (“Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a facto[r] in determining whether there is an abuse of discretion.”) (internal quotation and citations omitted). Other factors to be considered, as borrowed from the law

of trusts, include: (1) the extent of the discretion conferred upon the administrator by the terms of the plan, (2) the purposes of the plan, (3) the nature of the administrator's powers, (4) whether a definite external standard exists by which the reasonableness of the administrator's conduct can be judged, and (5) the motives of the administrator in exercising his or her powers. *Restatement (Second) of Trusts*, § 187, Comment d, (1957 Main Vol.). *See also Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000)(The common law of trusts offers a starting point for analysis of ERISA claims unless it is inconsistent with the language of the statute, its structure, or its purpose.).

However, mere allegations of the existence of a structural conflict of interest are not enough for the court to reject a plan administrator's denial of benefits where there is substantial evidence in the administrative record which supports his or her decision; there must be some evidence that the alleged conflict of interest actually affected the plan administrator's decision to deny benefits. *See Peruzzi v. Summa Med. Plan*, 137 F.3d 431, 433 (6th Cir.1998) ("Because our review of the record reveals no significant evidence that SummaCare based its determination on the costs associated with Mrs. Peruzzi's treatment . . . we cannot conclude that SummaCare was motivated by self-interest in this instance."); *see also Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir.1998) ("We presume that a fiduciary is acting neutrally unless a claimant shows by providing specific evidence of actual bias that there is a significant conflict."); *Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1259 (2d Cir.1996) ("[A] reasonable interpretation of the Plan will stand unless the participants can show not only that a potential conflict of interest exists, . . . but that the conflict affected the reasonableness of the Committee's decision.") (internal quotation and citations omitted).

There is no evidence that the Plan Administrator's decision was affected by his other positions with DowBrands. Plaintiff points to no evidence in the administrative record that suggests that Wales' decision was based on anything other than his interpretation of the plan language. Further, as the defendant asserts, the sole purpose for appointing the Claims Fiduciary was to ensure "a full and fair review" of plaintiffs' claims. The CTAP granted power to the Plan Administrator to delegate his authority to a committee or other individual within DowBrands to review claims for benefits. However, to avoid the appearance of a conflict of interest, Wales appointed an independent consultant to act as Claims Fiduciary to review the administrator's determination. Although the Claims Fiduciary, Robert Eldridge, was a former employee of DowBrands, he left the company several years earlier, retained independent ERISA counsel to review the plan, compiled an extensive administrative record, and issued a detailed opinion in which plaintiffs' claims were ultimately denied. Furthermore, plaintiffs failed to allege with any particularity that the Claims Fiduciary had a conflict of interest. Consequently, if Wales' decision, as informed by the Claims Fiduciary's review, that the plaintiffs are not entitled to CTAP benefits is supported by substantial evidence in the administrative record, it must be affirmed. *Davis*, 887 F.2d at 693 (If it is "possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious.").

III.

There is no dispute in this case that all of the plaintiffs were offered and accepted reemployment by SCJ for the same jobs at the same base salary and that the new employment did not require relocation. The defendant relied on these facts in concluding that subparagraph 7 in the "Eligibility for Benefits" section of the CTAP disqualified plaintiffs from receiving CTAP benefits.

The plaintiffs argue, however, that subparagraph 7 does not apply because their new employment with SCJ “involve[s] . . . a reduction in job status.” They argued to the Claims Fiduciary, and contend in this Court, that “job status” was reduced because:

1. . . . [T]he claimants were no longer able to apply for and receive jobs through the Dow Job Announcement System (JAS). The action by DowBrands, Inc., in closing the JAS five months before the termination of Claimants’ employment, eliminated a valuable right which the Claimants had previously enjoyed. This clearly had a negative economic impact on the Claimants by closing job opportunities. . . .

2. The Claimants . . . would not be provided service credit for purposes of determining retirement plan benefits under the SC Johnson Retirement Plan. [] This resulted in the Claimants no longer accruing pension benefits at the same rate at which they had accrued while they were employees of DowBrands, Inc. An additional factor reduced pension benefits by SC Johnson. SC Johnson calculates its pension benefits using base pay, while DowBrands, Inc.’s calculations were based on a broader definition of compensation, including base pay plus overtime at base, and scheduled performance awards. . . .⁷

3. Each claimant also suffered a reduction in benefits, other than pension, either because benefits formerly offered by DowBrands, Inc. were not offered by SCJ, or because the Claimants now receive benefits which are greatly reduced or offered only at increased cost The reduced non-pension benefits constitute a reduction in job status, because the new employer evaluates the Claimants’ jobs in a reduced manner for those non-pension benefits also. . . .

4. As a result of becoming employed at SC Johnson, there are deductions from each employee’s check by SC Johnson & Company. One of these deductions is for “JMBA” dues. Each SC Johnson employee has the amount of \$3.21 taken from his or her paycheck every pay period. This is a deduction which is imposed on the Claimants. . . .

AR a 271-73.

Plaintiffs further assert that because the term “job status” is not defined in the CTAP, the

⁷While the plaintiffs’ counsel acknowledged that SCJ “has now amended their pension plan,” counsel asserts that the initial disparity “triggered” the plaintiffs’ eligibility for CTAP benefits, or in the alternative, it is anticipated that the amended plan of SCJ will still result in the accrual of reduced pension benefits at SCJ.

language of the CTAP is ambiguous and the Court therefore should construe the ambiguity against DowBrands as the drafter of the plan so that the term is meant to include total compensation package, *i.e.*, base salary plus bonus, benefits and employee services. Plaintiffs contend that if construed accordingly, plaintiffs' alleged reduction in benefits packages, pensions and employee services at SCJ constituted reductions in their job status.

As noted above, the Court's task in a review of an ERISA plan administrator's denial of benefits is to determine if he offered a "reasoned explanation, based on the evidence." *Davis*, 887 F.2d at 693. In assessing that interpretation, however, the Court must "temper" or "shape" its deferential review by taking into account any conflict of interest which might discredit the reasoning of the plan administrator or, as here, the claims fiduciary. *University Hospitals of Cleveland v. Emerson Electric Company*, 202 F.3d 839, 846 (6th Cir. 2000). Furthermore, "to the extent that the Plan's language is susceptible of more than one interpretation, [the Court may] apply the rule of *contra proferentum* and construe any ambiguities against . . . the drafting part[y]." *Id.* at 846-47, (citing *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 557 n. 7 (6th Cir. 1998) (quotations omitted)).⁸ An ambiguity requires at least two reasonable interpretations. *Id.* However, the mere fact that the parties disagree as to the meaning of a term does not create an ambiguity in a legal sense. *Id.* Finally, the Sixth Circuit has made clear that it "grant[s] plan administrators who are vested with discretion in

⁸The defendant argues that the rule of *contra proferentum* has not been applied in the Sixth Circuit outside of the context of insurance plans. It also asserts that the various Circuits have either applied the rule in ERISA cases involving insurance contracts or have held that the rule is not applied where arbitrary and capricious review is required. *Contra proferentum*, or "against the offeror," is a common law rule of contract construction, however, and the case law does not reflect that application of the rule must be limited to insurance contracts governed by ERISA. *University Hospitals of Cleveland, supra*, is one such case that does not appear to involve an insurance contract, yet the Court of Appeals applied the rule when interpreting the plan.

determining eligibility for benefits great leeway in interpreting ambiguous terms.” *Moos v. The Square D Co.*, 72 F.3d 39, 42 (6th Cir. 1995).

In this case, the Claims Fiduciary concluded that plaintiffs were paid substantially similar salaries in their new positions at SCJ, and they did not experience a reduction in job level. AR at 1244, 1247. He acknowledged that “reduction in job status” is not defined explicitly in the CTAP; however, in order to define the term, he considered “the plain meaning of those words, DowBrands’ historical interpretation of the phrase, as well as how the phrase was used other places in CTAP.” *Id.* at 1245.

The Claims Fiduciary observed that under the section in the CTAP entitled, “EXCEPTIONS TO PARTICIPATION,” which precedes the eligibility section, “reduced job status” was referred to as a reduction “either in salary or job evaluation.” *Id.* See also AR at 22. He noted that this reference was consistent with what he recalled was DowBrands’ historic interpretation of the term “reduced job status.”

The Claims Fiduciary in turn found it necessary to define the terms “salary” and “job evaluation.” First, he asserted that DowBrands historically used the term “salary” to mean “base pay” only, excluding ancillary benefits. *Id.* at 246. He observed that the Claimants did not argue that their base pay was reduced. He further stated that

[n]o language in the CTAP suggests that a comparison should be made between the total compensation package of salary-plus-benefits at the two companies to determine eligibility for CTAP post-employment benefits. In fact, it would be ludicrous to establish any plan criteria that compares the total compensation package of salary-plus-benefits of predecessor and successor employers because you will always be comparing apples and oranges. These are not reasonable plan criteria and are not the written criteria of the CTAP.

Id. at 256. It should also be noted that although the Claims Fiduciary did not reference language

within the CTAP that defined “salary,” within the section entitled “BENEFITS,” which describes the severance benefits paid to eligible employees, under CTAP “salary” is defined as “base [] salary, excluding bonus or special awards, such as Performance Awards.” *Id.* at 23.

Second, the Claims Fiduciary attempted to define the term “job evaluation.” Relying on his “past personal knowledge of Dow Human Resource practices,” as well as information gathered during his investigation, he defined “job evaluation” as “a measurement system used by the Company to determine the relative worth of each job to the organization and to set job levels and to establish base salary ranges.” *Id.* at 1246. He supported his finding with (1) an interview of Kathleen Anderson, current Human Resources Manager of S.C. Johnson Company in Bay City, (2) a review of the stated purpose of CTAP set forth under the section entitled “DESCRIPTION AND PURPOSE OF THE PLAN,” and (3) interviews of the CTAP drafters. Based on his examination of this evidence, the Claims Fiduciary concluded that “there were no changes made in Claimants’ job evaluations or job levels.” *Id.*⁹

⁹The Claims Fiduciary, Robert Eldridge, relied on a statement by Kathleen Anderson in which she asserted,

“[r]educed job status would be something like being placed in a lower level job or losing money. ‘Job evaluation’ is a little more difficult, because DowBrands and S.C. Johnson use different systems for evaluating exempt jobs. There are no changes for [plaintiffs], though - they have the same job levels as before. They match both salary-wise and level-wise, so no one lost status or salary.

...

“Note: Kathy said some reasons why the claimants may be concerned about benefits are: a) a few components of the SCJ package are not as good as DowBrands’ (retirement income benefits for employees near retirement age, e.g.); other SCJ components (vision care, variable pay programs, etc.), however, are actually better”

AR at 1104-5.

With regard to the “purpose” of CTAP, Eldridge found that “[t]he CTAP’s stated purpose is ‘to provide specified post-employment benefits’” *Id.* at 1246 (quoting from AR at 20.) Eldridge reasoned that the plaintiffs “did not find themselves truly unemployed and never experienced a period of real and actual job loss.... [They] never experienced a period of time when they were without a job or they lost income. They merely moved from one company’s payroll to another company’s payroll.” *Id.* Furthermore, Eldridge observed that “[t]he CTAP ‘DESCRIPTION AND PURPOSE’ provision suggests that post-employment benefits are available only in a reduction in force situation. No reduction or consolidation of the workforce occurred here.” *Id.* at 1247.

Eldridge also conducted interviews with individuals involved in the drafting of the CTAP in an attempt to identify their intent for incorporating the term, “reduction in job status.” Specifically, he interviewed Debra Cort Burns, former DowBrands Director of Human Resources & Diversity; James M. Phillips, former DowBrands Director of Compensation & Benefits; and Charles Joseph Miller, attorney. Eldridge also interviewed Wales. From these interviews, Eldridge reached the following conclusions:

“The drafters of CTAP used the phrase ‘reduction in job status’ with specific intent. This language was used by those who established the CTAP, and its predecessor plan, the DowBrands Termination Payment Plan, to refer to certain types of employee job demotions that might have been accompanied by reductions in salary. Such demotions with salary reductions would trigger payment of benefits under CTAP and under the prior plans upon which the CTAP was based []. In this transaction with SCJ, none of the Claimants were demoted when they transferred to SCJ.

“In addition to demotions above which involved a reduction in salary, ‘reductions in job status’ included demotions which involved any of the following, regardless of whether the employee’s salary was affected: a) a decrease of three or more job levels in the DowBrands salary structure; b) a significant reduction in management responsibility (e.g., demotion from manager to subordinate in the same work group) or c) reclassification from exempt to non-exempt FLSA status. This type of demotion also did not happen to the employees transferred to SCJ. *See* A.R. 001061, Interview of Debra Cort Burns...; A.R. 001074, Interview of James M. Phillips . . . ; A.R. 001096 - 97, Interview of William W. Wales . . . ; A.R. 001104, Interview of Kathleen M. Anderson. . .

“The Plan drafters did not intend ‘reduction in job status’ to include consideration of the total compensation package of salary-plus-benefits. Instead they intended ‘reduction in job status’ to include only an employee’s base salary. *See* A.R.

The Claims Fiduciary concluded his summary by stating that “[u]nder the language of the [CTAP], and based upon the evidence contained in the Administrative Record, Claimants are not entitled to CTAP post-employment benefits.” AR at 1259.

The plaintiffs offer arguments that the term “salary” could be given a more expansive definition than the one used by the Claims Fiduciary and the Plan Administrator. They assert that “[t]o the extent that ‘salary’ is a part of ‘job status,’ the expanded definition of the term for which plaintiffs argue is consistent with the way it is defined in other contexts.” Plaintiff’s Brief at 8. The plaintiffs then refer the Court to the Equal Pay Act (“EPA”), 29 U.S.C. § 206(d) for the proposition that the term “wages” is consistent with the term “salary” and is deemed to include “all forms of compensation. . . .” Plaintiff’s Brief at 9.

The Court notes that section 206(d) of the EPA prohibits employers from discriminating on the basis of gender by paying employees of opposite sexes disparate wages, all other factors remaining the same. “Wages” is not defined within the statute, however, as “all forms of compensation.” One must look to 29 C.F.R. § 1620.10, also referenced by the plaintiffs, which defines “wages” under the EPA as “salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name.” Benefit packages, job placement programs and pensions are not referenced.

001061, Interview of Debra Cort Burns; A.R. 001074, Interview of James M. Phillips; A.R. 001096-97, Interview of William W. Wales; A.R. 001104 [Interview] of Kathleen M. Anderson.

“Claimants’ job levels remained the same as before their transfer to SCJ employment. *See* A.R. 001120-21, Interview of Kathleen M. Anderson.”

AR at 1257.

Further, section 1620.10 further states that “[w]ages’ as used in the EPA (the purpose of which is to assure men and women equal remuneration for equal work) will therefore include payments which may not be counted under . . . the FLSA” Therefore, it is apparent from the very regulation cited by the plaintiffs that the term “wages” is not defined consistently within the EPA and FLSA. Furthermore, the plaintiffs fail to explain why the Court should adopt a definition of “reduced job status” which is consistent with the definition of wages as defined in the EPA.

Notwithstanding plaintiffs’ alternate interpretation of the plan language, the Court finds, after thorough review of the determination of the Plan Administrator and the Claims Fiduciary in light of the administrative record, that their interpretation of the term “job status” is “rational in light of the plan’s provisions.” *Smith*, 129 F.3d at 863. The latitude afforded plan fiduciaries in interpreting plan language when making eligibility determinations is consistent with ERISA’s goal of promoting the orderly and efficient administration of employee benefit plans. “To limit [a plan] administrator’s discretion to only those terms explicitly defined would undermine the administrator’s discretionary power or require companies to write interminably long plans to account for every term.” *Administrative Committee of the Sea Ray Employees’ Stock Ownership and Profit Sharing Plan v. Robinson*, 164 F.3d 981, 986 (6th Cir.), *cert. denied*, 528 U.S. 1114 (2000).

IV.

The Court has considered the extent of the discretion conferred upon the administrator by the terms of the plan, the stated purpose of the plan, the nature of the administrator’s powers as defined by the plan, the absence of a definite external standard by which the reasonableness of the administrator’s conduct can be judged, and the motives of the administrator in exercising his or her powers to the extent demonstrated by the administrative record. The Court finds that the decision

denying the plaintiffs benefits under DowBrands' CTAP was neither arbitrary nor capricious. The determination was supported by "substantial evidence" which is "rationale in light of the plan's provisions." *Baker*, 929 F.2d at 1144; *Smith*, 129 F.3d at 863.

Accordingly, the defendant's motion for judgment on the administrative record (dkt # 32] is **GRANTED**. The plaintiffs' request for a judgment directing the defendant to pay CTAP benefits to the plaintiffs in accordance with the terms of the plan is **DENIED**. The decision of the plan administrator, as confirmed by the claims fiduciary, is **AFFIRMED**.

/s/

DAVID M. LAWSON
United States District Judge

Dated: July 24, 2001

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ROBERT ADCOCK, SR., RONALD
AHO, CHARLES AMOS, JR., JOYCE
ANDRZEJEWSKI, DANIEL P. AUMAN,
DOUGLAS F. BEJCEK, TODD BERO,
WAYNE J. BERSANO, LOUISE M.
BLANCHARD, JERRY BOLLENBACHER,
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DOUGLAS A. BOWERS, LEE A.
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MATHEW KOMPEAS, KIP E. KUSSRO, GREGORY

Case No: 98-CV-10427-BC
Honorable David M. Lawson

(JUDGMENT)

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WILKINSON, DALE A. WOODS, THERESA YOUNG,
CHRISTINE ANN-JEAN ZINGG, aka A. J. ZINGG, and
ROBERT C. ZINGG, II,

(JUDGMENT)

Plaintiffs,

v.

DOWBRANDS, INC.,

Defendant,

_____ /

JUDGMENT

This matter having come before the Court on defendant's motion for judgment on the administrative record,

In accordance with the Opinion and Order Granting Defendant's Motion for Judgment on the Administrative Record entered on this date,

It is **ORDERED AND ADJUDGED** that judgment enter in favor of the defendant and against the plaintiffs.

It is further **ORDERED AND ADJUDGED** that the decision of the Plan Administrator, as confirmed by the Claims Fiduciary, is **AFFIRMED**.

DAVID M. LAWSON
United States District Judge

Dated: July 24, 2001

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